No. 85-651

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1985

BUDD LEPMAN,

Petitioner,

vs.

NEW JERSEY RACING COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

LEE W. SHELLY
FOLEY, SHELLY & NIEMANN
Attorneys for Petitioner
Six South Holmdel Road
Holmdel, New Jersey 07733
(201) 946-2030

2856
Lutz Appellate Printers, inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587 • MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTION PRESENTED

On the basis of a positive post-race urinanalysis indicating the presence of phenylbutazone, the New Jersey Racing Commission suspended the petitioner's thoroughbred trainer's license. At an evidentiary hearing, the petitioner established that trace amounts of the drug would not affect a horse's speed or performance in a race. The Racing Commission and the courts upheld the suspension. The question thus presented is:

Does the irrebuttable presumption of affected performance violate the due process clause of the Fourteenth Amendment since there is no scientific basis for the presumption?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Jurisdiction	2
Constitution and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Brewer v. Porch, 53 N.J. 167 (1967)	3
Cleveland Board of Education v. LaFleur, 414 U.S. 32, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974)	5
Dare v. State, 159 N.J. Super. 533 (App. Div. 1978)	4
Edelberg v. Illinois Racing Board, 540 F. 2d 279 (1976)	4

Contents

Page

Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) 5

Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973) 5

Statute Cited:

28 U.S.C. § 1257(3) 2

United States Constitution Cited:

Fourteenth Amendment ..... i, 2

APPENDIX

Appendix A—Opinion of Superior Court of New Jersey, Appellate Division, Docket No. A-1674-83T2 ..... 1a

Appendix A—Opinion of Superior Court of New Jersey, Appellate Division, Docket No. A-4724-82T5 ..... 7a

Appendix B—Judgment of the Supreme Court of New Jersey, Docket No. 24,160 ..... 13a

Appendix B—Judgment of the Supreme Court of New Jersey, Docket No. 22,250 ..... 14a

Appendix C—Relevant New Jersey Regulations 15a

Appendix D—Florida and Pennsylvania Racing Regulations 17a

No.

In The

Supreme Court of the United States

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BUDD LEPMAN,

Petitioner,

vs.

NEW JERSEY RACING COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Budd Lepman, the petitioner herein, prays that a writ of certiorari issue to review the judgments of the Supreme Court of New Jersey entered in the above entitled cases on July 23, 1985.

OPINIONS BELOW

The opinions of the Appellate Division of the Superior Court of the State of New Jersey are printed in Appendix A, *infra,* pages 1a-12a. These opinions have not been reported. The final judgment of the Supreme Court of the State of New Jersey appear in Appendix B, *infra.*

JURISDICTION

The judgments of the Supreme Court of New Jersey were entered on July 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTION AND REGULATIONS INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following provisions of the New Jersey Administrative Code (Thoroughbred Racing Regulations) include N.J.A.C. 13-70-14a.1; 13:70-14a.7; 13:70-14a.12; N.J.S.A. 13:70-20 (reproduced in Appendix C, 15a-16a).

STATEMENT OF THE CASE

Petitioner is a thoroughbred horse trainer with a long and distinguished career who was racing his horses at Monmouth Park Jockey Club in Oceanport, New Jersey, during the summer of 1983. In accordance with procedure, winning and claimed horses from races are tested after their race for the presence of drugs. On two occasions, the petitioner's horses proved positive in such

post-race testing. On each occasion, the stewards imposed a suspension which was appealed to the Office of Administrative Law, where evidentiary hearings were conducted. At the first hearing, the petitioner produced an expert in forensic toxicology, who testified that the particular drug, phenylbutazone, had an effective dosage and that the drug in trace amounts would not affect a horse's speed or performance in a race.

The testing procedures followed by the New Jersey Racing Commission did not establish a quantitative amount, merely the presence of the drug. Accordingly, the petitioner argued that the Commission had failed to establish that his horse's speed or performance were affected in the race, and consequently was not guilty of a violation of the regulations since the regulations had to be interpreted to be directed at race-tampering. The petitioner did not argue against the strict liability character of the regulations, which imposed liability without regard to the factual circumstances surrounding the manner in which the horse may have been drugged or the trainer's culpability in that regard. The petitioner focused on the fact that the current status of scientific knowledge did not warrant a finding of a violation without establishing the quantity of the drug present in the horse's system. The petitioner also established that quantitative analysis was readily available, and that other states performed quantitative testing and set permissible levels in their horse racing regulations.

In this case, the expert testimony is unrefuted that the mere presence of the drug would have no affect on a horse's speed or performance.

In seeking to discover the intent of a law it must be read in light of the mischief sought to be eliminated. *Brewer v. Porch,* 53 N.J. 167 (1969). In this particular regard, the mischief sought to be eliminated is the tampering with horses in races. The administration of medication and anti-inflammatory drugs in and of itself is not prohibited.

No argument is made against the strict liability or absolute insurer character of the regulations. Mr. Lepman, as the trainer, would be strictly liable for the condition of the horse; but that condition must be such as to affect the horse's speed or performance in a race.

The reliance, therefore, of the Racing Commission upon *Dare v. State,* 159 N.J. Super. 533 (App. Div. 1978), is misplaced. Furthermore, the appellant proffered no expert testimony in the *Dare* case. In this case, the expert testimony is unrefuted that the mere presence of a drug would have no effect on the horse's speed or performance; that phenylbutazone would only be effective at a dose of 40 milligrams per liter; that no quantitative tests were performed; and that quantitative testing is available and could have been performed.

The position of the Racing Commission is that the presence of the drug in any amount constitutes a violation and an irrebuttable presumption, therefore, that any amount of the drug affected a horse's speed or performance in a race.

The United States Court of Appeals for the Seventh Circuit came to a similar although not identical conclusion in the case of *Edelberg v. Illinois Racing Board,* 540 F. 2d 279 (1976). The factual circumstances are strikingly similar, and in dealing with the argument that the irrebuttable presumption dealt with in that case, *i.e.,* that drugged horses substantially affect performance in a race, that court found the presumption to be rational, reasonable and permissible. However, that decision was rendered in 1976 with apparently no contradictory scientific evidence available to the court; and with a significantly different presumption in issue. The presumption in *Edelberg* was that *drugged* (emphasis added) horses affected performance in a race. The presumption here is that the presence of a drug in any amount proves the horse effectively drugged. Clearly, the second

presumption that a drug in any amount affects a horse's speed or performance would not survive the arbitrary, unreasonable, test of *Cleveland Board of Education v. LaFleur,* 414 U.S. 32, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973); *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). The testimony of the petitioner's expert in this matter, Dr. Bidanset, clearly establishes that any such presumption would be arbitrary and unreasonable since there is an effective dosage with a simple procedure available to quantitatively determine the amount present in a horse's system.

Further support of the proposition can be found in the Racing Commission rules of other states which, like New Jersey, allow the use of phenylbutazone for non-racing purposes.

Pennsylvania establishes a permissible level of two micrograms per milliliter of plasma for phenylbutazone. Florida establishes a permissible level of 110 micrograms per milliliter of urine for phenylbutazone.

LaFleur dealt with an irrebuttable presumption of physical incompetency to teach while pregnant. This presumption was found irrational, arbitrary, and unreasonable in light of the fact that a teacher's capacity or competence might not be affected according to medical evidence. A similar finding is required here, where the scientific evidence is that trace amounts of a drug would not affect a horse's speed or performance in a race.

REASONS FOR GRANTING THE WRIT

Both the horse racing and gambling industries in the United States have experienced substantial growth and project further substantial growth. The people employed in these industries are subject to strict regulation and licensing procedures. It is the growth of the industry that has led to a demand for more horses available for racing to the permissible use of anti-inflammatory and anti-bleeding drugs by regulatory authorities. New Jersey does not prohibit the use of the anti-inflammatory drug, phenylbutazone, for medicinal purposes in their regulatory scheme. Other states, notably Pennsylvania and Florida, have established permissible levels for existence of the drug in testing procedures which quantify the amount. Interstate transportation of horses for racing purposes is common, and the interpretation of New Jersey's regulations by its Commission has far-reaching effects.

Certainly, a strong argument could be made for national uniformity in regulations which affect a national industry, but at the very least, the regulations of any state must comply with the due process requirements of the United States Constitution.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LEE W. SHELLY
FOLEY, SHELLY & NIEMANN
Attorneys for Petitioner

APPENDIX A—OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DOCKET NO. A-1674-83T2

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1674-83T2

BUDD LEPMAN,

Petitioner-Appellant,

v.

NEW JERSEY RACING COMMISSION,

Respondent-Respondent.

Submitted April 22, 1985—Decided MAY 28, 1985

Before Judges Morton I. Greenberg, O'Brien and Gaynor.

On appeal from final decision of the New Jersey Racing Commission.

Foley, Shelly & Niemann, attorneys for appellant (Lee W. Shelly, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent (James J. Ciancia, Assistant Attorney General, and Michael J. Haas, Deputy Attorney General, on the brief).

Appendix A

PER CURIAM

This is an appeal by a licensed horse trainer from the suspension of his racing privileges for 45 days by the New Jersey Racing Commission (Commission) for a violation of *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.7. We affirm.

On August 11, 1982, appellant's horse, "Silver Valley," won the eighth race at Monmouth Park Racetrack. However, on August 16, 1982, the purse was redistributed by ruling of the Board of Stewards because phenylbutazone had been detected in the horse's blood and urine. On September 4, 1982, the Board of Stewards suspended petitioner's racing privileges for 45 days. Petitioner appealed the decision to the Commission and the matter was transferred to the Office of Administrative Law as a contested case. Originally, the appeal was consolidated with a similar charge concerning a different horse, upon which appellant had received a 30-day suspension. However, the matters were deconsolidated and the original case was finally decided on appeal by this court on January 17, 1984 under docket number A-4724-82T5.

In this case, the administrative law judge (ALJ) concluded that there was absolutely no competent evidence to demonstrate that the urine sample had been taken from Silver Valley. However, he concluded that there was sufficient evidence to prove that the blood sample came from Silver Valley and that a proper chain of custody and testing procedure was demonstrated. He decided that appellant had violated *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.7, but he recommended a 35-day rather than a 45-day suspension because of appellant's unblemished record.

On application of appellant, the matter was reheard by the ALJ to consider newly discovered evidence in the form of a tape

recording of a hearing by the Board of Stewards conducted on July 30 and August 3, 1983 in connection with another case. In that tape, one James Patrick, who was employed as a groom by appellant in 1982 and 1983, admitted that he gave butazolidin, which contains phenylbutazone, to "Never-Been-Tested," another one of defendant's horses. However, Patrick firmly denied that he had ever given phenylbutazone to Silver Valley. Based upon an inference that Patrick had given Silver Valley phenylbutazone under circumstances over which appellant had no control, the ALJ recommended a $500 fine and 10-day suspension rather than a 35 or 45-day suspension without a fine. Prior to the second hearing, appellant's counsel had stated that the previous determination by the ALJ that appellant had violated the regulations was "not being attacked in any way at this time."

The Commission accepted the ALJ's findings of fact in the initial decision that defendant had violated the regulations, but rejected his conclusion that Patrick had administered the drug to Silver Valley. It also found that appellant had stipulated at the second hearing that he had violated the regulations. The Commission rejected the ALJ's proposed penalty and reimposed the original 45-day suspension.

Appellant's primary argument is that the regulations read as a whole only prohibit administration of drugs which affect a horse's speed or performance and that it had not been demonstrated that phenylbutazone affected Silver Valley's speed or performance. He also argues that, if the presumption that phenylbutazone in any amount affects a horse's speed or performance is an irrebuttable presumption, it is unconstitutional.

The language used by appellant's counsel at the second hearing seems to amount to a stipulation that appellant did not

contest the original finding that he had violated the regulations. However, even assuming that counsel did not intend such a stipulation, the arguments advanced by appellant have no merit. *N.J.A.C.* 13:70-20.7 recites specific responsibilities of trainers. It states: "A trainer is responsible for the condition of a horse trained by him." *N.J.S.A.* 13:70-20.11(a)(3) reads: "a trainer shall not enter or start a horse that . . .[h]as been given in any manner whatsoever . . . any stimulant, depressant, local anesthetic, tranquilizer, anti-inflammatory or chemical of any kind or description, prior to the race." It is not disputed that phenylbutazone is an anti-inflammatory drug.

The same arguments made by appellant were rejected by us in *Lepman v. New Jersey Racing Commission,* A-4724-82T5 (App. Div. January 17, 1984). They were also rejected in several other cases, including the reported case of *Dare v. State*, 159 *N.J.Super.* 533 (App. Div. 1978), where a trainer was suspended from racing because his horse was found positive for phenylbutazone. In that case, the trainer attacked the validity of the previous version of *N.J.A.C.* 13:70-14A.7 since it did not require a trainer to know that a drug had been administered to his horse in order to find him liable. We found that promulgation of the rule was "to place absolute responsibility upon the trainer in situations in which a horse has been administered a drug." *Id.* at 536. We found that due to "[t]he danger of clandestine and dishonest activity inherent in the business of horse racing" strict regulation was appropriate. *Id.* at 536-537. After citing a number of cases upholding liability without fault or knowledge on the part of the person charged with the violation, we concluded that "the regulations are reasonable because of the nature of the subject matter regulated and . . . their enforcement does not deprive the licensee of due process." *Id.* at 8-539.

Appendix A

As to appellant's contention that the 45-day suspension was an abuse of discretion, we note that the Commission rejected the finding of fact by the ALJ that the drug had been administered by Patrick, the groom, upon which the ALJ based his reduction of the suspension. In its decision rejecting the ALJ's conclusion, the Commission said:

> . . . The Trainer Responsibility Rules places an affirmative duty upon the trainer, not merely to refrain from the administration of drugs to his horse, but to 'guard and protect' against tampering by others. The absence of factual context demonstrating anything more than cursory precautions taken by Budd Lepman to safeguard 'SILVER VALLEY,' especially in light of the fact that another of Budd Lepman's horses, 'RAISE A MINT,' had been found positive for phenylbutizone six weeks earlier, leads this Commission to conclude that the 45-day penalty ordered by the Board of Stewards was appropriate and reasonable. Even if the Commission assumes that Patrick did administer phenylbutizone to 'SILVER VALLEY,' the Commission does not believe that is a sufficient mitigating factor to warrant reduction of the original penalty.

A reviewing court may modify an agency's penalty determination when it is illegal, arbitrary or an abuse of discretion. *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 93 (1973). We find

that the penalty imposed by the Commission is neither illegal, arbitrary, nor an abuse of discretion.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

APPENDIX A—OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DOCKET NO. A-4724-82T5

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4724-82T5

BUDD LEPMAN,

Appellant,

v.

NEW JERSEY RACING COMMISSION,

Respondent.

Argued December 20, 1983—Decided JAN 17, 1984

Before Judges Antell and Joelson.

On appeal from Final Decision of the New Jersey Racing Commission.

Lee W. Shelly argued the cause for appellant (Foley, Shelly and Niemann, attorneys).

Michael J. Haas, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Deborah T. Poritz, Deputy Attorney General, of counsel).

PER CURIAM

Appendix A

Following a hearing, the Board of Stewards of Monmouth Park Racetrack found appellant, a thoroughbred horse trainer, in violation of *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.7, and ordered his suspension for 30 days. He appealed this determination to the Racing Commission. The matter was referred to an Administrative Law Judge as a contested case. After a hearing, the Administrative Law Judge issued an initial decision in which he also concluded that appellant had violated *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.7, but he recommended that suspension should be reduced to 25 days. The Racing Commission in its final decision adopted the findings of the Administrative Law Judge, but reimposed the 30-day suspension. This is appellant's appeal from the Commission's final decision which found him guilty of violating *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.7.

Although appellant has failed to include in his appendix the charges against him, *see R.*2:6-1(a)(7), we were informed at oral argument that he was charged with violating *N.J.A.C.* 13:70-14A.7 which provides as follows:

> (a) The owner, trainer, veterinarian, groom or any other person who is charged with the custody, care and responsibility of a horse, are all obligated to protect and guard the horse against the administration or attempted administration, either internally or externally, or [*sic*] *any drug*. [Emphasis supplied]
>
> (b) If the stewards shall determine that any person recited herein before in this rule have failed to protect and guard said horse in accordance with this rule, they may suspend and/or fine such individual or individuals.

> (c) Every trainer has the duty to be familiar with the medication rules of this Commission and to be familiar with the chemical substances he administers and which are administered by his veterinarian or his employees or agents.

The other section which appellant was found to have violated, *N.J.A.C.* 13:70-20.7, provides that "[a] trainer is responsible for the condition of a horse trained by him."

In the brief submitted on his behalf, appellant points to *N.J.A.C.* 13:70-14A.1 which provides:

> No person shall administer any drug internally or externally, by injection, drench or otherwise, to a horse, which may affect its speed or performance in a race.

Appellant contends that " . . .the subsections of a regulation must be read together, and that the prohibition is against the administration of a drug in sufficient amount to effect [*sic*] a horse's speed or performance in a race, especially since administration of the drug phenylbutazone [the drug here implicated] is allowed." However, appellant is mistaken in his statement that phenylbutazone is allowed. It is not disputed that phenylbutazone is an anti-inflammatory drug. As a matter of fact, an expert witness produced by appellant so testified in the hearing before the Administrative Law Judge. Under *N.J.A.C.* 13:70-20.11(a)(3), it is provided that a trainer shall not enter or start a horse that has been given an anti-inflammatory substance. Specifically, *N.J.A.C.* 13.70-20.11(a)(3) provides that a trainer shall not enter or start a horse that:

Appendix A

> [h]as been given in any manner whatsoever, internally or externally, any stimulant, depressant, local anesthetic, tranquilizer, *anti-inflammatory* or chemical [*sic*] of any kind or description, prior to the race; . . . [Emphasis supplied.]

No mention is made in either party's brief of *N.J.A.C.* 13:70-20.11(a)(3). However, if it is true as claimed by appellant that *N.J.A.C.* 13:70-14A.7 which proscribes the administration of "any drug" must be read *in pari materia* with *N.J.A.C.* 13:70-14A.1 which proscribes the administration of any drug "which may affect its speed or performance in a race," then *N.J.A.C.* 13:70-14A.7 must also be read *in pari materia* with *N.J.A.C.* 13:70-20.11(a)(3) which forbids a trainer to enter or start a horse that has been given " . . .anti-inflammatory or chemical [*sic*] of any kind or description, prior to the race." Indeed it appears that most, and perhaps all, of the substances mentioned in *N.J.A.C.* 13:70-20.11(a)(3) may be such as to affect the speed or performance of a horse. Despite the fact that appellant was charged under the general "any drug" section, *N.J.A.C.* 30:70-14A.7, he had knowledge of the fact that the drug implicated was the anti-inflammatory substance, phenylbutazone. This knowledge is proven by appellant's production of an expert witness who testified as to the nature of phenylbutazone at the hearing which resulted in the determination of his guilt.

In *Febbi v. Div. of Employment Sec.* 35 *N.J.* 601, 606 (1961), the Court stated that it is a cardinal rule of statutory construction that " . . .all sections must be read together in the light of the general intent of the act so that the auxiliary effect of each individual part of a section is made consistent with the whole." *See also Seatrain Lines, Inc. v. Medina,* 39 *N.J.* 222, 226-227 (1963). Although that rule of construction was used with reference

to interpretation of a statute, we see no reason why its palpable good sense should not apply equally to regulations promulgated by an administrative agency pursuant to statutory authority. The regulations which we consider here were adopted pursuant to the authority of *N.J.S.A.* 5:5-22 *et seq.*

We note that the regulations referred to above do not specifically delineate the period of time prior to a race in which drug administration is forbidden.[1] It might be argued that the regulations are fatally flawed because *N.J.A.C.* 13.70-14A.7 forbids the administration of "any drug" to a horse, but contains no time limitation, and *N.J.A.C.* 13:70-20.11(a)(3) which forbids specific substances merely refers to a time "prior to the race." However, it would be neither sensible nor humane to interpret the subsection as meaning that no racehorse could ever be administered drugs to cure illness or alleviate suffering at *any* time prior to its being raced. "Interpretations which lead to absurd or unreasonable results are of course to be avoided . . . ." *State v. Gill*, 47 *N.J.* 441, 444 (1966). *See also Davis v. Heil*, 132 *N.J. Super.* 283, 293 (App. Div. 1975), aff'd 68 *N.J.* 423 (1975). Since the regulations contain provisions for urine and blood testing of a horse, the intention is obviously to make it a violation for a prohibited substance to be administered sufficiently near the time of a race to be detected by such tests. Violations ordinarily come to light through testing, and the case under review is no exception

---

1. Although *N.J.A.C.* 13:70-20.11(a)(4), which is a model of murky syntax, employs the phrase "on the day of the race," a painstaking reading of the subsection reveals that this phrase relates back to "external rubs and innocuous compounds, none of which shall contain any ingredient forbidden under paragraph 3 . . ." The phrase "on the day of the race" is also found in *N.J.A.C.* 13:70-21.4, but that section also is inapposite because it applies to an owner who knowingly enters a horse which has received the specified medication.

since urine and blood tests of the horse in question proved positive for phenylbutazone after the race.

In *Dare v. State*, 159 *N.J. Super.* 533 (App. Div. 1978), in which we held that the regulations of the Racing Commission place absolute responsibility upon the trainer when a horse has been administered a drug, the drug involved was also phenylbutazone. It was not suggested in that case, nor does appellant here assert, that the regulations pertaining to the administering of drugs to horses are vague or overbroad. But although the regulations may pass muster from the viewpoint of strict constitutional law, they are in need of revision as they have not been professionally drawn. Regulations should ordinarily not need as much interpretation as we have been obliged to give them in this opinion. Not only are there problems of syntax, but the regulations are so physically separated as to drugs that an important section was apparently overlooked by both appellant and respondent. Further, they are to a large extent repetitious and overlapping. We offer the suggestion that they can profit from restructuring and reframing.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin

Clerk

APPENDIX B—JUDGMENT OF THE SUPREME COURT OF NEW JERSEY DOCKET NO. 24,160

SUPREME COURT OF NEW JERSEY
M-1094 SEPTEMBER TERM 1984

24,160

BUDD LEPMAN,

Plaintiff-Respondent,

vs.

NEW JERSEY RACING COMMISSION,

Defendant-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss appeal (A-229) is granted.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 23rd day of July, 1985.

/s/ Stephen W. Townsend
Clerk

A True Copy
/s/ Stephen W. Townsend
Clerk

Filed July 24, 1985

APPENDIX B—JUDGMENT OF THE SUPREME COURT OF NEW JERSEY DOCKET NO. 22,250

SUPREME COURT OF NEW JERSEY
M-40 SEPTEMBER TERM 1984

22,250

BUDD LEPMAN,

Plaintiff-Respondent,

vs.

NEW JERSEY RACING COMMISSION,

Defendant-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss appeal (A-79-84) is granted.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 23rd day of July, 1985.

/s/ Stephen W. Townsend
Clerk

A True Copy
/s/ Stephen W. Townsend
Clerk

Filed July 24, 1985

APPENDIX C—RELEVANT NEW JERSEY REGULATIONS

N.J.A.C. 13:70-14A.7:

> Protecting horses against drug administration (a) the owner, trainer, veterinarian, groom or any other person who is charged with the custody, care and responsibility of a horse, are all obligated to protect and guard the horse against the administration or attempted administration, either internally or externally, or any drug. (b) If the Stewards shall determine that any person recited hereinbefore in this rule has failed to protect and guard said horse in accordance with this rule, they may suspend and/or fine such individuals. (c) Every trainer has the duty to be familiar with the medication rules of this Commission and to be familiar with the chemical substances he administers and which are administered by his veterinarian or his employees or agents.

N.J.A.C. 13:70-20:

> A trainer is responsible for the condition of a horse trained by him.

N.J.A.C. 13:70-14A.1:

> Drugs
> No person shall administer any drug internally or externally, by injection, drench, or otherwise, to a horse, *which may affect its speed or performance in a race.* (Emphasis added.)

Appendix C

N.J.A.C. 13:70-14A.12:

Procedure following positive chemical analysis

* * * *

5. Should the stewards determine that any person is guilty of violation of any sections 1, 2, 7 or 10 of the subchapter, they may punish the offender by fine, suspension or ruling off.

APPENDIX D—FLORIDA AND PENNSYLVANIA RACING REGULATIONS

DEPARTMENT OF BUSINESS REGULATION
THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32301-8164

MEMORANDUM

TO: Affected Horse Industry Participants

FROM: Robert M. Rosenberg, Deputy Director

RE: Drugs and Medication in Florida Horse Racing

DATE: November 23, 1982

The use of drugs and medication on horses racing in Florida is governed by Section 550.241, Florida Statutes, and a series of Rules in the Florida Administrative Code which implement the provisions of this statute. These are summarized below.

I. IMPERMISSIBLE SUBSTANCES

Horses may not race with any drug, medication, stimulant, depressant, narcotic, local anesthetic or any drug masking agent. Among those things which are prohibited are non-steroidal anti-inflammatory drugs such as Banamine, Equiproxen, Arquel and Naproxen.

The only exceptions to the prohibition against racing horses with drugs or medication are described below. Unless a substance or class of substance is explicitly approved, its use is prohibited,

and finding the substance in a post-race blood or urine sample would produce a report of a drug positive.

II. PHENYLBUTAZONE

Phenylbutazone may be administered to racing horses, provided:

a) It is not administered within 24 hours preceding the officially scheduled post time of the race in which the horse is entered, and

b) The post-race urine sample does not contain in excess of 110 micrograms of phenylbutazone and/or its derivatives per milliliter of urine.

* * * *

Pennsylvania State Racing Commission, Rules of Racing 1982

§163.304. Substances of therapeutic value.

A foreign substance of accepted therapeutic value may be administered as prescribed by a veterinarian when test levels and guidelines for its use have been established by the Veterinary-Chemist Advisory Committee of the National Association of State Racing Commissioners and approved by the Racing Commission.

(1) Only one approved nonsteroidal anti-flammatory drug (NSAID) may be present in the body of a horse while it is participating

in a race. The presence of more than one NSAID at any test level is forbidden.

(2) The test level of phenylbutazone under this section shall not be in excess of two micrograms (mcg.) per milliliter (ml) of plasma.

85-651

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BUDD LEPMAN,

Petitioner,

v.

NEW JERSEY RACING COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY RACING COMMISSION

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
New Jersey Racing Commission
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-4776

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

MICHAEL J. HAAS
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT—The Writ Sought Here Should Be Denied Because The Courts Below Correctly Interpreted And Applied The New Jersey Trainer Responsibility Rule	6
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES CITED

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 12

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 7, 10, 11

Dare v. State, 159 N.J. Super. 533, 388 A.2d 984 (App. Div. 1978) 4, 8, 10, 11, 12

Stanley v. Illinois, 405 U.S. 645 (1972) 7, 10, 11

Weinberger v. Salfi, 422 U.S. 749 (1975) 11

NEW JERSEY STATUTES CITED

N.J.S.A. 5:5-22 12

N.J.S.A. 5:5-30 12

N.J.S.A. 5:5-71 12

NEW JERSEY REGULATIONS CITED

N.J.A.C. 13:70-14A.7 ..... 2, 3, 4, 5, 7, 9, 10

N.J.A.C. 13:70-20.11(a)(3) 4, 5, 9

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BRIEF IN OPPOSITION

The respondent, New Jersey Racing Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the decisions of the New Jersey Supreme Court entered in these two cases on July 24, 1985.*

* Although two separate suspensions and two separate appeals, which were never consolidated for review by the New Jersey appellate courts, are involved here, Lepman has filed a single petition for a writ of *certiorari* seeking to have this Court review the two orders of dismissal issued by the New Jersey Supreme Court.

COUNTERSTATEMENT OF THE CASE

Petitioner Budd Lepman is a licensed trainer of racehorses in the State of New Jersey. On July 1, 1982 and again on August 11, 1982, the drug phenylbutazone was detected in two of Lepman's horses after post-race blood and urine analyses had been conducted by representatives of the New Jersey Racing Commission (App. 8a; App. 2a). Based upon these findings, the Racing Commission found in each case that Lepman had violated the New Jersey Trainer Responsibility Rule, *N.J.A.C.* 13:70-14A.7, which places absolute responsibility upon the trainer of the horse to protect and guard it from the administration of any drug, and Lepman's racing privileges were suspended for periods of 30 and 45 days, respectfully, for each violation (App. 8a; App. 2a). The Racing Commission's decisions were subsequently affirmed by the New Jersey Superior Court, Appellate Division, in two separate written opinions (App. 7a to 12a; App. 1a to 6a). Lepman appealed both Appellate Division decisions to the New Jersey Supreme Court which, on July 24, 1985, granted the Racing Commission's motions to dismiss the appeals on the ground that Lepman had failed to raise a substantial question arising under the Constitution of the United States or of the State of New Jersey (App. 13a to 14a). The facts underlying each separate suspension will now be set forth.

A. The July 1, 1982 Race

On July 1, 1982, "Raise A Mint," a horse under the training and care of Lepman, finished eighth in the fourth race at the Monmouth Park Racetrack. A post-race urine and blood analysis of the horse conducted by representa-

tives of the New Jersey Racing Commission disclosed the presence of the anti-inflammatory drug phenylbutazone (App. 8a). Following a hearing, the Board of Stewards of the Monmouth Park Racetrack found Lepman in violation of *N.J.A.C.* 13:70-14A.7, commonly known as the Trainer Responsibility Rule, and ordered his suspension from racing for 30 days (App. 8a). Lepman appealed this determination to the Racing Commission, which stayed the imposition of the suspension and transferred the matter to the New Jersey Office of Administrative Law for hearing as a contested case. After a hearing, the Administrative Law Judge issued an initial decision in which he concluded that Lepman had violated the Trainer Responsibility Rule, but he recommended that the suspension should be reduced to 25 days (App. 8a). The Racing Commission, in its final decision of May 26, 1983, adopted the findings of the Administrative Law Judge that Lepman had violated the Trainer Responsibility Rule, but reimposed the original 30-day suspension (App. 8a).

On June 9, 1983, Lepman filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division, challenging the suspension. He also filed motions for a stay of the suspension pending appeal with the Appellate Division, a single Justice of the New Jersey Supreme Court and the entire New Jersey Supreme Court. These motions were denied and Lepman served the 30-day suspension during the period between June 13 and July 12, 1983.

In a *per curiam* decision dated January 17, 1984, the Appellate Division affirmed the final decision of the Racing Commission. In so ruling, the court specifically held that the substance found in Lepman's horse after the race, phenylbutazone, was an anti-inflammatory drug which was

prohibited under *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.11(a)(3) (App. 8a to 12a). The court further held that the intent of the regulations "is obviously to make it a violation for a prohibited substance to be administered sufficiently near the time of a race to be detected by . . . [post-race urine and blood testing of a horse]" (App. 11a). Because the anti-inflammatory drug phenylbutazone was detected in the urine and blood tests taken of Lepman's horse following the race, the court held, citing its decision in *Dare v. State,* 159 *N.J. Super.* 533, 388 *A.*2d 984 (App. Div. 1978), that Lepman had violated the Trainer Responsibility Rule and had been properly suspended from racing for the 30-day period between June 13, 1983 and July 12, 1983 (App. 7a to 12a).

Lepman filed a Notice of Appeal from this decision with the New Jersey Supreme Court on February 6, 1984. On April 9, 1984, the Racing Commission filed a motion to dismiss Lepman's appeal on the ground that it did not present a substantial question arising under the Constitution of the United States or of the State of New Jersey. The New Jersey Supreme Court granted the Racing Commission's motion and dismissed Lepman's appeal on July 24, 1985 (App. 14a).

B. The August 11, 1982 Race

On August 11, 1982, "Silver Valley," a horse under the training and care of Lepman, finished first in the eighth race at the Monmouth Park Racetrack. A post-race blood analysis of the horse disclosed the presence of the anti-inflammatory drug phenylbutazone. Following a hearing, the Board of Stewards suspended Lepman's racing privileges for 45 days for violation of the Trainer Responsi-

bility Rule (App. 2a). Lepman appealed this determination to the Racing Commission, which stayed the imposition of the suspension and transferred the matter to the New Jersey Office of Administrative Law for a hearing. After a hearing, and a subsequent rehearing, the Administrative Law Judge issued an initial decision holding that Lepman had violated the Trainer Responsibility Rule, but recommending that the penalty be reduced to a $500 fine and a 10-day suspension (App. 2a to 3a). The Racing Commission, in its final decision of December 1, 1983, adopted the findings of the Administrative Law Judge that Lepman had violated the Trainer Responsibility Rule, but reimposed the original 45-day suspension (App. 3a).

On December 9, 1983, Lepman filed a Notice of Appeal with the New Jersey Superior Court, Appelliate Division. On that same date, he made an application for a stay of the suspension pending appeal which was granted by the Appellate Division.

In a *per curiam* decision dated May 28, 1985, the Appellate Division affirmed the final decision of the Racing Commission (App. 1a to 6a). As in the previous case, the court specifically held that the substance found in Lepman's horse after the race, phenylbutazone, was an anti-inflammatory drug which was clearly prohibited under 13:70-14A.7 and *N.J.A.C.* 13:70-20.11(a)(3) (App. 4a). The court also held that Lepman's argument that the Trainer Responsibility Rule was based upon "an unconstitutional irrebuttable presumption" was without merit and had previously been rejected in numerous other New Jersey cases (App. 4a). Because the anti-inflammatory drug phenylbutazone was detected in Lepman's horse following the

race, the court held that Lepman had violated the Trainer Responsibility Rule and had properly been suspended from racing for a period of 45 days (App. 1a to 6a).

Lepman filed a Notice of Appeal from this decision with the New Jersey Supreme Court on June 5, 1985. Lepman's motion for a stay of the suspension was denied by the New Jersey Supreme Court on June 14, 1985. On June 18, 1985, Lepman made an application for a stay pending appeal to the United States Supreme Court, which was denied on June 19, 1985. Thus, as in the previous case, Lepman has already served the 45-day suspension imposed by the Racing Commission.

On June 27, 1985, the Racing Commission filed a motion to dismiss Lepman's appeal on the ground that it did not present a substantial question arising under the Constitution of the United States or of the State of New Jersey. The New Jersey Supreme Court granted this motion and dismissed Lepman's appeal on July 24, 1985 (App. 13a).

ARGUMENT

The Writ Sought Here Should Be Denied Because The Courts Below Correctly Interpreted And Applied The New Jersey Trainer Responsibility Rule.

In support of his petition, Lepman argues that the Trainer Responsibility Rule, which requires the trainer to protect and guard his horse against the administration of any drug, violates the due process clause in that it cre-

ates an impermissible irrebutable presumption. In essence, it is Lepman's contention that a violation of *N.J.A.C.* 13:70-14A.7 cannot be susptained in the absence of a demonstration by the Racing Commission that the drug detected in a horse through post-race testing also affected the horse's speed or performance. Based upon this incorrect premise, that the Racing Commission, through the Trainer Responsibility Rule, only intended to prohibit drugs which affect a horse's speed or performance in a race, Lepman argues that the Racing Commission, after finding that a drug is present in the horse's system following a race, presumes that the drug affected the horse's speed or performance. The "irrebuttable presumption" thus created, according to Lepman, is constitutionally improper. In support of this position, Lepman cites *Cleveland Board of Education v. LaFleur*, 414 *U.S.* 632 (1974), and *Stanley v. Illinois*, 405 *U.S.* 645 (1972). The irrebuttable presumption doctrine used in these two cases is not applicable here, however, for the following reasons. Moreover, the cases were properly decided by the New Jersey courts, present no issue of any public importance and, accordingly, require no further review by this Court.

First, no irrebuttable presumption exists in these cases. As the New Jersey Superior Court, Appellate Division held in both cases, the Racing Commission properly found that Lepman had violated *N.J.A.C.* 13:70-14A.7, which provides in pertinent part:

> (a) The owner, trainer, veterinarian, groom or any other person who is charged with the custody, care and responsibility of a horse, are all obligated to protect and guard the horse against the administration or attempted administration, either internally or externally, [of] any drug.

> (b) If the stewards shall determine that any person recited herein before in this rule has failed to protect and guard said horse in accordance with this rule, they may suspend and/or fine such individual or individuals.

This regulation has been interpreted by the New Jersey courts as imposing upon thoroughbred trainers a standard of strict liability in the event of pre-race administration of drugs to a horse under the trainer's responsibility. *Dare v. State,* 159 *N.J. Super.* 533, 536, 388 *A.*2d 984, 985 (App. Div. 1978). In *Dare v. State,* the Appellate Division recognized the strong public interest involved in the business of legalized gambling in horse racing and referred to the inherent dangers accompanying this enterprise:

> The language employed indicates that the Commission did indeed intend, by adopting the [Trainer Responsibility Rule], to place absolute responsibility upon the trainer in situations in which a horse has been administered a drug. [159 *N.J. Super.* at 536, 388 *A.*2d at 985].

The court held that such a strict liability standard was not violative of due process. 159 *N.J. Super.* at 538-539, 388 *A.*2d at 986. In the present cases, the Appellate Division held that Lepman's suspensions, which are strikingly similar on their facts to *Dare,* were manifestly proper (App. 3a to 4a; App. 9a to 10a). As in *Dare,* the suspensions here were imposed after Lepman's horses tested positive for phenylbutazone. The Appellate Division held that in such cases the trainers are absolutely liable under the clear provisions of the Trainer Responsibility Rule.

In its decisions, the Appellate Division rejected Lepman's meritless argument that the Racing Commission intended, in the regulations it has adopted, to prohibit only

drugs which affect a horse's speed or performance in a race. The Appellate Division held that the anti-inflammatory drug phenylbutazone, which was detected in the urine and blood samples taken from Lepman's horses following the races in question, was expressly prohibited by the Racing Commission's regulations (*N.J.A.C.* 13:70-20.11(a)(3)),* and that the plain language of the Trainer Responsibility Rule clearly showed that the intended restriction was upon *any* drug and not just stimulants or substances which are known to affect the speed and performance of a horse (App. 3a to 4a; App. 9a to 10a). In the present cases, therefore, the Racing Commission did not improperly presume that the drugs detected in Lepman's horses affected their speed or performance in a race. Here, Lepman was specifically charged with violating the Trainer Responsibility Rule, *N.J.A.C.* 13:70-14A.7, which as stated above, was intended to render a trainer responsible for failure to protect and guard "again the administration or attempted administration . . . of *any drug.*" (Emphasis added.)

Thus, no presumptions—irrebuttable or otherwise—are involved here, therefore, rendering inapplicable the

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* Under *N.J.A.C.* 13:70-20.11(a)(3), it is provided that a trainer shall not enter or start a horse that has been given an anti-inflammatory substance. Specifically, *N.J.A.C.* 13:70-20.11(a)(3) provides that a trainer shall not enter or start a horse that:

> [h]as been given in any manner whatsoever, internally or externally, any stimulant, depressant, local anesthetic, tranquilizer, *anti-inflammatory* [sic] or chemical of any kind or description prior to the race; . . . [Emphasis added.]

It is not disputed that phenylbutazone, the drug found in Lepman's horses following the races in question, is an anti-inflammatory drug (App. 4a; App. 10a).

holdings in *LaFleur* and *Stanley* upon which Lepman relies. Tests made of Lepman's horses' blood and urine following the races in question were positive for phenylbutazone which is unquestionably a drug. This positive finding was competent proof that Lepman had failed to "protect and guard" his horse against the administration "of any drug," as required by *N.J.A.C.* 13:70-14A.7, the only charge at issue. *Dare v. State, supra,* 159 *N.J. Super.* at 536, 388 *A.*2d at 985. Therefore, the suspensions imposed under the Trainer Responsibility Rule were clearly proper and the New Jersey Supreme Court correctly dismissed Lepman's appeals (App. 13a to 14a). In light of the plain language of, and authority contained in, *N.J.A.C.* 13:70-14A.7 and set forth uniformly in the existing case law, there is certainly no need for this Court to review the matter any further. Accordingly, Lepman's continued attempt to ascribe a different purpose to the regulations than was intended by the Racing Commission, in order to fashion a constitutional issue to support his petition to this Court, must fail.

Lepman's attempt to use the irrebuttable presumption doctrine in this case should also be rejected because the doctrine has been severely limited by this Court to situations quite dissimilar from the one presented here. The demise of the doctrine was advocated in a strong concurring opinion by Justice Powell in *Cleveland Board of Education v. LaFleur, supra,* 414 *U.S.* at 651, where he maintained that "irrebuttable presumptions" were really nothing more than legislative classifications which should be reviewed under equal protection analysis—that is, most commonly, under the rational basis standard. This view quickly found favor with the majority of the Court in

Weinberger v. Salfi, 422 *U.S.* 749, 767-770 (1975). There the Court used the rational basis test to review the duration of relationship requirements which widows needed to satisfy before qualifying for Social Security benefits. The Court distinguished *LaFleur* and *Stanley* as meriting greater scrutiny because these cases involved fundamental rights associated with the family and protected by the Constitution. *Weinberger v. Salfi, supra*, 422 *U.S.* at 771-772. Since the right to train a horse is not a fundamental right protected by the Constitution, *LaFleur* and *Stanley* do not apply here and the rational basis test governs instead.

It is beyond question that the objectives of the New Jersey Trainer Responsibility Rule challenged here—the protection of the horses involved and the preservation of the public trust in the horse racing industry—are legitimate state objectives. As the Appellate Division stated in *Dare v. State, supra,*

> The danger of clandestine and dishonest activity inherent in the business of horse racing has been well recognized. *Garifine v. Monmouth Park Jockey Club*, 29 *N.J.* 47, 55 (1959). The business itself and the legalized gambling which accompanies its activities are strongly affected by a public interest. *State v. Garden State Racing Ass'n*, 136 *N.J.L.* 173, 175 (E. & A. 1947). Corruption in horse racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. *State v. Sipp*, 149 *N.J. Super.* 459, 460 (App. Div. 1977). Strict and close regulation is therefore regarded as highly appropriate. *Jersey Downs, Inc. v. Div. of N.J. Racing Comm'n*, 102 *N.J. Super.* 451, 457 (App. Div. 1968). [159 *N.J. Super.* at 536-537, 388 *A.*2d at 985.]

To achieve this goal, the New Jersey Legislature has vested the Racing Commission with broad powers "necessary

or proper to enable it to carry out fully and effectually all the provisions and purposes of this act." *N.J.S.A.* 5:5-22. The Racing Commission has also been granted power to prescribe rules under which horse races shall be conducted, *N.J.S.A.* 5:5-30, and to license trainers and other persons acting in any capacity with the training of race horses pursuant to such rules and regulations it may adopt. The New Jersey Legislature has expressed particular concern with attempts to influence race results through the use of drugs. In this regard, *N.J.S.A.* 5:5-71, among other things, proscribes the administration or attempted administration of *any drug* to a horse that is to run in a race. Significantly, *N.J.S.A.* 5:5-71 proscribes the use of *any drug,* and does not confine itself only to those drugs which may affect a horse's speed and performance. Thus, the Racing Commission's adoption of the Trainer Responsibility Rule, prohibiting the presence of *any drug* in a horse raced in New Jersey, was manifestly proper and in full accord with the legislative mandate. *Dare v. State, supra,* 159 *N.J. Super.* at 537-538, 388 *A.*2d at 986. Consequently, the regulations in issue here are rationally related to important state objectives, as the courts below found. Clearly, no question of federal law has been raised justifying review by this Court.

In applying the rational basis test, courts do not debate the wisdom of a particular policy, but rather leave such judgments to the legislative body charged with making the classification—that is, as long as its choice is reasonably related to a legitimate state objective. Whether another policy could achieve similar ends is immaterial, therefore, as long as the chosen policy meets the rational basis test. *See City of New Orleans v. Dukes,* 427 *U.S.* 297, 303 (1976).

Consequently, it is irrelevant if Lepman thinks that another rule would be better, or if other jurisdictions prefer different and less stringent rules more to his liking. Thus, the petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief and the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Respondent
New Jersey Racing Commission

By: MICHAEL J. HAAS
Deputy Attorney General
Counsel of Record

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